

# **VICTIMS, WITNESSES, AND JUSTICE REFORM (SCOTLAND) BILL**

---

## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Victims, Witnesses, and Justice Reform (Scotland) Bill, introduced in the Scottish Parliament on 25 April 2023.
2. The following other accompanying documents are published separately:
  - a Financial Memorandum (SP Bill 26–FM);
  - a Policy Memorandum (SP Bill 26–PM);
  - a Delegated Powers Memorandum (SP Bill 26–DPM);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 26–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

5. The Bill, which makes a number of changes to the law on the treatment of victims and witnesses (and other vulnerable people involved in court proceedings) and on civil and criminal justice, is in 7 Parts as follows:

- Part 1 – will establish a new Victims and Witnesses Commissioner for Scotland and make provision about the Commissioner’s functions.
- Part 2 – will impose a requirement on criminal justice agencies to have regard to trauma-informed practice in carrying out their functions; will require the standards of service produced by those criminal justice agencies to include standards on trauma-informed practice; will require the courts to consider trauma-informed practice in relation to how criminal and civil proceedings are conducted; and will require the judiciary to take trauma-informed practice into account when scheduling criminal and civil court business.
- Part 3 – will provide for the special measures available to the courts in relation to vulnerable witnesses in some court proceedings to be available in all civil proceedings; will extend the range of special measures available to include allowing the court to prohibit parties from personally conducting their own case; and will make provision for special measures to be available where parties to civil proceedings are regarded as vulnerable.
- Part 4 – will abolish the not proven verdict; and will make provision for criminal juries, including reducing the normal jury size in a criminal trial from 15 to 12 jurors, providing that a jury can continue to sit in a case provided at least 9 jurors remain, and providing for the minimum number of jurors needed to deliver a guilty verdict.
- Part 5 – will establish a new Sexual Offences Court to try persons accused of certain sexual offences.
- Part 6 – will provide for a number of other reforms of the criminal justice system, in particular:
  - lifelong anonymity for victims of certain sexual offences (subject to waiver by the victim or the court in certain circumstances);
  - a right for legal representatives of complainers in certain sexual offences cases to make representations in relation to applications made for the purposes of section 275(1) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to admit certain sexual history and character evidence; and
  - the ability to run a pilot of rape trials before a judge without a jury.
- Part 7 – contains the final provisions, including provision defining “trauma-informed practice” as well as provision for commencement of the Bill.

## **CROWN APPLICATION**

6. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. This Bill applies to the Crown in the same way as it applies to everyone else. The Bill amends a number of existing enactments, some of which do, and some of which do not, apply to the Crown. The Bill generally makes no change to the application of those enactments to the Crown. See, however, new section 106H of the Criminal Justice

(Scotland) Act 2016, being inserted by section 63 of this Bill, which makes provision for the application to the Crown of the offence provision in new section 106F.

## **PART 1 – VICTIMS AND WITNESSES COMMISSIONER FOR SCOTLAND**

7. This Part of the Bill establishes the office of Victims and Witnesses Commissioner for Scotland (“the Commissioner”), and makes provision for the Commissioner’s functions, powers, and duties.

### ***Establishment***

#### **Section 1 and schedule 1 – Victims and Witnesses Commissioner for Scotland**

8. Subsection (1) of section 1 establishes the office of Victims and Witnesses Commissioner for Scotland. Subsection (2) introduces schedule 1, which makes provision about various administrative matters including the status, remuneration, and terms of appointment of the Commissioner, and about the Commissioner’s staff.

9. Paragraph 1 of schedule 1 provides that the Commissioner’s status is that of a juristic person distinct from the natural person holding the office of Commissioner. In addition, the Commissioner is not to be regarded as being a servant or agent of the Crown. The Commissioner’s property belongs to the Commissioner and not to the Crown, and the Commissioner’s staff are not civil servants.

10. Paragraph 2 of schedule 1 provides that, except in certain specified provisions of the Bill, the Commissioner is not bound to follow orders or directions from members of the Scottish Parliament, the Scottish Ministers, or the Scottish Parliamentary Corporate Body (“SPCB”).

11. Paragraphs 3 and 4 of schedule 1 provide for the appointment, and disqualification from appointment, of the Commissioner. The Commissioner will be appointed by the King, following their nomination by the Scottish Parliament. The Commissioner may only serve one term of office, and a person is disqualified from being appointed Commissioner if at the time of the appointment, or in the year preceding the appointment, the person is or has been a member of the Scottish Parliament, the House of Commons, or the House of Lords, or a member, employee, or appointee of one of the criminal justice agencies defined in section 23 of the Bill. This is to ensure that the Commissioner is free from political influence, given that the role will involve scrutiny of the operation of the criminal justice system.

12. Under paragraph 5 of schedule 1, the Commissioner may hold office for a single term of up to 8 years, as determined by the SPCB at the time of appointment. This is consistent with the tenure arrangements set out in the Scottish Parliamentary Commissions and Commissioners etc. (Scotland) Act 2010.

13. Paragraph 6 of schedule 1 sets out the circumstances under which a Commissioner's appointment may terminate early. A Commissioner may resign, or become disqualified from holding office under paragraph 4. The Commissioner can also be removed from office where either the SPCB is satisfied that the Commissioner has breached their terms and conditions of appointment and the Parliament resolves to remove the Commissioner as a result, or where the Parliament resolves that it has lost confidence in a Commissioner's willingness, suitability or ability to perform the Commissioner's functions. A resolution in either scenario requires the support of at least two thirds of (normally) the total number of members of the Scottish Parliament. However, the number of votes required is based on the number of seats, so the percentage does not reduce if a seat is temporarily vacant pending a by-election.

14. Paragraph 7 of schedule 1 provides that the validity of any acts of the Commissioner is unaffected by any procedural defects in the Parliament's nomination or by the Commissioner subsequently becoming disqualified from acting as the Commissioner.

15. Paragraph 8 of schedule 1 enables the SPCB to set and pay such remuneration, allowances, pension and gratuities to the Commissioner as it determines. It will be for the SPCB to decide whether payments are made and the amounts of any payments. The SPCB must indemnify the Commissioner for liabilities incurred by the Commissioner in the exercise of their functions. This means that when the Commissioner incurs costs in carrying out their functions, they are entitled to recover those costs from the SPCB.

16. Under paragraph 9 of schedule 1, the SPCB may determine the terms and conditions of the Commissioner's appointment insofar as not already set out in the Bill, including prohibiting the Commissioner from holding any other office, employment or appointment, or requiring that the Commissioner first obtain the approval of the SPCB before holding any other office, employment or appointment. This is to avoid any appointment being seen to compromise the independence of the Commissioner.

17. Paragraph 10 of schedule 1 makes provision for the appointment of a temporary Commissioner to hold the office either during a period when the post is vacant or where the Commissioner is unable to perform their functions. During that period, the SPCB may appoint as temporary Commissioner a person who has not previously held the position and who is not disqualified from holding the post under paragraph 4 of this schedule. The SPCB will determine the terms, conditions and duration of the appointment and may relieve the individual from the post at its discretion (by notice in writing), or at the request of the individual.

18. Paragraphs 11 and 12 of schedule 1 allow the Commissioner to appoint staff, subject to the consent of the SPCB as to the numbers, and to determine their terms and conditions subject to the approval of the SPCB.

19. Paragraph 13 of schedule 1 allows the Commissioner to pay pensions, allowances and gratuities to current or former members of staff, including the establishment of one or more

pensions schemes and pay allowances and gratuities by way of compensation for loss of employment. Approval for such arrangements must be obtained from the SPCB.

20. Under paragraph 14 of schedule 1, while the Commissioner can delegate any function to any person, ultimately the Commissioner remains responsible for the performance of those delegated functions. Having delegated functions, the Commissioner is still able to decide to perform those functions personally.

21. Paragraph 15 of schedule 1 places an obligation on the Commissioner to comply with directions from SPCB in relation to the location of the Commissioner's office, and the sharing of any resources with any other public office or body.

22. Paragraph 16 of schedule 1 requires the Commissioner to prepare a budget for approval by the SPCB before each financial year. The Commissioner may revise the budget during the year, with the SPCB's approval again being required. The Commissioner is placed under a duty to ensure the economical, efficient, and effective use of the Commissioner's resources.

23. Paragraph 17 of schedule 1 makes provision for the SPCB to designate an accountable officer for the Commissioner – either the Commissioner or a member of the Commissioner's staff. The accountable officer's responsibilities include the signature of accounts, and ensuring the propriety and regularity of finances and the economical, efficient, and effective use of resources. If the accountable officer is not the Commissioner then the accountable officer requires to send to the Auditor General for Scotland a copy of the Commissioner's written authority in respect of any action which the accountable officer has been required to take which the accountable officer considers to be inconsistent with the proper performance of their functions.

24. Paragraph 18 of schedule 1 requires the Commissioner to keep proper accounts and records, and prepare and send to the Auditor General for Scotland an annual statement of accounts. The Commissioner is bound to comply with directions from the Scottish Ministers about those accounts, records, and statement, and following audit, to make the statement of accounts available for inspection on request, to any person and without charge.

### ***Functions and powers***

#### **Section 2 – functions**

25. Section 2 provides that the Commissioner's general function is to promote and support the rights and interests of victims and witnesses. Definitions of "victims" and "witnesses", for the purposes of this part of the Bill, are included in section 23.

26. Subsection (2) imposes on the Commissioner a duty to carry out certain specific activities in order to achieve that general function. The activities include engagement with relevant persons, raising awareness, monitoring compliance with statutory duties, promoting best practice, especially by criminal justice agencies in relation to trauma-informed practice, and producing

research. A definition of “criminal justice agency”, for the purposes of this Part of the Bill, is included at section 23. The criminal justice agencies are the Lord Advocate, the Scottish Ministers, the chief constable of the Police Service of Scotland, the Scottish Courts and Tribunals Service, and the Parole Board for Scotland.

### **Section 3 – civil function**

27. Section 3(1) gives the Scottish Ministers a power to make regulations extending the Commissioner’s general function to cover persons involved in proceedings other than criminal proceedings, such as proceedings relating to contract disputes or civil damages, as described in subsection (2).

28. Subsection (3)(a) allows for the regulations to define which proceedings and persons are to be included within the extended function of the Commissioner. Subsection (3)(b) provides for the regulations to impose on the Commissioner a duty to carry out certain specific activities in exercising the extended function. These activities broadly match the activities which the Commissioner will already be obliged to carry out under section 2 in relation to criminal proceedings, and persons involved in those proceedings.

29. Regulations under this section will be subject to the affirmative procedure.<sup>1</sup>

### **Sections 4 and 5 – engagement, and advisory group**

30. Section 4 contains more detail about the engagement which the Commissioner is obliged to carry out, as part of the general function, with victims, witnesses, and persons providing support to victims. Subsection (1) allows the Commissioner to establish groups through which to carry out engagement. Separately, it imposes on the Commissioner a duty to pay particular attention to groups of victims and witnesses who do not have other ways of interacting with the criminal justice process. Subsection (2) requires the Commissioner to prepare a strategy setting out how they will carry out the duty of engagement, and to review this to ensure it remains up to date.

31. Section 5 provides for the establishment of an advisory group, at the discretion of the Commissioner. The Commissioner is empowered, by subsection (2), to appoint the members of such a group, and under subsection (3) to pay remuneration and expenses to those members. The Commissioner requires the approval of the Scottish Parliamentary Corporate Body for the appointment and payment of members of any such advisory group.

---

<sup>1</sup> See section 67(2) and [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](#).

## **Section 6 – power to work with others**

32. Subsection (1) of section 6 allows the Commissioner to work with the parties named in subsection (2), on terms agreed between the Commissioner and the relevant party, to assist those parties as requested, and to consult them.

## **Section 7 – general powers**

33. Subsection (1) of section 7 provides a general, overarching power for the Commissioner to do things relative to the exercise of the Commissioner’s functions. Subsection (2) places a requirement on the Commissioner to obtain the approval of SPCB before making payments for services.

## **Section 8 – restriction on exercise of functions**

34. Section 8 sets out restrictions which apply to the exercise of the Commissioner’s functions. Subsection (1) prevents the Commissioner from acting in relation to individual cases. “Individual case” is defined in subsection (4) as including a particular victim or witness, particular proceedings, or anything done in a judicial capacity. Subsection (2) provides that, despite that restriction, the Commissioner may consider individual cases and their impact on matters relevant to the Commissioner’s functions. This means that while the Commissioner may, for example, consider how a criminal justice agency’s actions in relation to a particular case demonstrate their adherence to trauma-informed practice, the Commissioner may not intervene in that case.

35. Subsection (3) allows the Commissioner to act in relation to events that took place before the section came into force, where relevant – but this will not include individual cases due to the restriction in subsection (1).

## ***Strategic Plan***

### **Section 9 – strategic plan**

36. Section 9 deals with strategic planning by the Commissioner. Subsection (1) provides for a strategic plan to be prepared every 3 years, and laid before the Scottish Parliament. Subsection (2) requires the Commissioner to consult with SPCB and other relevant persons prior to publishing a plan. Subsection (3) sets out what each strategic plan must include. Subsections (4) and (5) make provision for revision by the Commissioner of a strategic plan, which the Commissioner can choose to do at any time.

## ***Investigations***

### **Sections 10 and 11 – carrying out investigations, and initiation and conduct of investigation**

37. Section 10 empowers the Commissioner to carry out investigations into the regard which a criminal justice agency has, or has had, to the rights, interests, and views of victims and witnesses when doing things that affect those victims and witnesses. Section 23 defines “criminal justice

agency”, for the purposes of this Part of the Bill, as being each of the Lord Advocate, the Scottish Ministers, the chief constable of the Police Service of Scotland, the Scottish Courts and Tribunals Service, and the Parole Board for Scotland..

38. Subsection (2) provides that the Commissioner must be satisfied that any work carried out as part of an investigation is not work which should be carried out by another person. This would include, for example, work that falls within the remit of the Children and Young People’s Commissioner for Scotland. This is to avoid the unnecessary duplication of work. Subsection (3) prevents the Commissioner from carrying out investigations, or work as part of a wider investigation, in relation to decisions made or actions taken in legal proceedings, or matters which are subject to legal proceedings.

39. Subsection (1) of section 11 requires the Commissioner to prepare terms of reference for each investigation the Commissioner intends to carry out, and to make sure that people who might be affected by the investigation are made aware, in advance, that the investigation will take place. Subsection (2) provides that, as far as possible, investigations must be carried out in a way that is publicly accessible.

### **Sections 12 and 13 – investigations: witnesses and documents, and reports on investigations**

40. Subsection (1) of section 12 gives the Commissioner powers to collect evidence during an investigation. The Commissioner can do this by requiring persons to give evidence or produce documents relevant to the investigation. Subsections (2) to (4) set out restrictions to that power, and exceptions to when a person might be required to give evidence. In particular, subsection (2) prevents the Commissioner from imposing a requirement on a person that the Scottish Parliament could not, under section 23 of the Scotland Act 1998, require to attend its proceedings or produce documents. Section 23 provides, for example, that judges or members of a tribunal might not be required to give evidence, and makes provision for the circumstances in which Ministers of the Crown might be called upon to do so. The regulation-making power in subsection (5) enables the Scottish Ministers to make further provision in relation to the giving of evidence. That might include, for example, provision about matters such as the giving of evidence under oath, or the application of privilege. That regulation-making power will be subject to the negative procedure.<sup>2</sup>

41. Section 13 places a duty on the Commissioner to publish a report on an investigation when that investigation is complete, and to lay a copy of the report before the Scottish Parliament. Subsection (2) allows the Commissioner to include in the report a requirement for the criminal justice agency which was the subject of the report to respond to the report with a statement. Subsection (3) requires the Commissioner to give the criminal justice agency a draft of the report and the opportunity to make comments to the Commissioner about its contents before the

---

<sup>2</sup> See section 67(3) and [section 28 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk).



Commissioner publishes the report. This applies even if the report contains no requirement, under subsection (2), for the criminal justice agency to respond to the report.

### ***Information gathering***

#### **Section 14 – power to gather information**

42. Section 14 empowers the Commissioner to require criminal justice agencies to give information to the Commissioner. The section covers any information that the Commissioner reasonably requires to establish whether the agency is in compliance with its standards of service, or the Victims Code for Scotland, under the Victims and Witnesses (Scotland) Act 2014. Subsection (2) sets out the content of the notice which the Commissioner must give the agency when information is required. Subsections (3) and (4) set out exemptions to the obligation on criminal justice agencies to supply information to the Commissioner under this section.

#### **Section 15 – offence of Commissioner disclosing confidential information**

43. Section 15 imposes a confidentiality obligation on the Commissioner, the Commissioner's staff, and any agent of the Commissioner. It also covers persons who have previously held any of those positions. Subsection (1) creates an offence, which applies only to those persons, of disclosing information obtained in the course of carrying out the Commissioner's functions. Information which was in the public domain at the time of the disclosure, or had previously been in the public domain, is not covered by the offence.

44. Subsection (3) sets out circumstances in which disclosure of information which would otherwise be covered by the offence is authorised. These circumstances are: where the information is disclosed with the consent of the person from whom it was obtained, where disclosure was necessary for the exercise of the Commissioner's functions, for example the disclosure of information obtained from one criminal justice agency to another criminal justice agency in the promotion of joined-up trauma-informed practice, and where disclosure was made for the purposes of criminal or civil legal proceedings or the investigation of an offence or suspected offence. Subsection (4) goes on to provide that where disclosure was made for the purposes of the Commissioner's functions, it must not include the disclosure of information which would be likely to lead to the identification of any victim, witness, or person suspected (but not charged) with committing an offence.

45. Subsection (5) sets out that the penalties which might be imposed on a person convicted of the offence are a fine up to the statutory minimum on summary conviction, or a fine on conviction on indictment.

## ***Annual report***

### **Section 16 – annual report**

46. Section 16 requires the commissioner to prepare and publish a report on the Commissioner's functions each financial year, and to lay a copy of the report before the Scottish Parliament. The report is to include a review of relevant issues, a review of the Commissioner's activity, any recommendations by the Commissioner, and a summary of the Commissioner's proposed activity for the following year.

47. Subsection (3) sets out examples of matters in relation to which the Commissioner might make recommendations in the annual report. These include training of staff of criminal justice agencies, statutory standards, trauma-informed practice, and the provision of information to victims and witnesses. Subsection (4) provides for the SPCB to give the Commissioner directions in relation to the form and content of the report, and prohibits the inclusion in the report of any information which might lead to the identification of an individual.

### **Sections 17 and 18 – requirement to respond to annual report, and publication of responses to report**

48. Section 17 provides that where a report under section 16 names a criminal justice agency or person providing victim support services, the report might also impose on that person a requirement to respond to the report. If the report imposes such a requirement, the Commissioner must give a copy of the report to the person, and specify a reasonable period for the person to reply. The person must reply within that period, responding to the relevant part of the report.

49. Section 18 requires the Commissioner to publish responses received under section 17, and to lay copies of those responses before the Scottish Parliament. The obligation to publish the response and lay it before the Parliament does not apply, under subsection (2), if the Commissioner considers publication and laying to be inappropriate. Subsection (3) provides that, in particular, the Commissioner must ensure that the published response does not include confidential information about an individual. If a person has not responded to a report which included a requirement for them to do so, the Commissioner may publicise the fact of that lack of response.

## ***Miscellaneous***

### **Section 19 – reports**

50. Section 19 provides a general power for the Commissioner to lay before the Scottish Parliament any reports that the Commissioner considers appropriate. This power is in addition to the Commissioner's obligation to lay its annual report, and reports on its investigations, before the Scottish Parliament. Any report laid under this section must, so far as reasonably practicable, not identify any individual who has given information to the Commissioner unless that individual has given prior consent to being named in the report.

## **Section 20 – protection from action of defamation**

51. Section 20 ensures that statements made to the Commissioner, and statements made by the Commissioner in a report on an investigation, have absolute privilege (meaning they cannot form the basis of an action of defamation by any person referred to in those statements). Other statements made by the Commissioner, by the Commissioner’s staff or by an agent of the Commissioner in the course of their duties, have qualified privilege (meaning they cannot form the basis of an action of defamation unless the statement was made with malice or intent to injure).

### *Duty to co-operate with Commissioner*

## **Section 21 – duty to co-operate with Commissioner**

52. Section 21 gives the Commissioner a power to request that a criminal justice agency co-operate with the Commissioner in the exercise of the Commissioner’s functions. Subsection (2) places a requirement on agencies who receive such a request to respond, either confirming that they will comply with the request, or giving reasons why they will not comply.

### *Application of public authorities legislation*

## **Section 22 and schedule 2 – application of public authorities legislation**

53. Section 22 introduces schedule 2, which inserts reference to the Victims and Witnesses Commissioner for Scotland into relevant legislation, so that that legislation will apply to, or in respect of, the Commissioner.

54. Paragraph 1 of schedule 2 adds the Commissioner to the list of authorities in schedule 2 of the Scottish Public Services Ombudsman Act 2002. The effect is to:

- make the Commissioner open to investigation by the ombudsman (see section 5 of the 2002 Act)
- oblige the Commissioner to have a complaints handling procedure that complies with the statement of principles published by the ombudsman under section 16A of the 2002 Act
- permit the Commissioner to be made subject to the further requirement to have a complaints handling procedure that complies with a model complaints handling procedure prepared by the ombudsman (see sections 16B and 16C of the 2002 Act).

55. Paragraph 2 of schedule 2 adds the Commissioner to the list of Scottish public authorities in schedule 1 of the Freedom of Information (Scotland) Act 2002. This means that the Commissioner will be subject to the requirements which that Act places on public bodies, including requirements to provide information to the public on request and to have in place a scheme for the pro-active publication of information it holds.

56. Being a public authority within the meaning of the Freedom of Information (Scotland) Act 2002 also makes the Commissioner a “Scottish public authority” to which the Environmental Information (Scotland) Regulations 2004 apply, meaning that the Commissioner will be bound to keep and make available certain environmental information relative to the Commissioner's functions.

57. It also means that the Commissioner falls within the definition of a “public body” under section 44 of the Climate Change (Scotland) Act 2009. This means that the Commissioner must act in a way calculated to contribute to the delivery of climate change targets and any climate change adaptation programme and in the way that the Commissioner considers is most sustainable. The Commissioner can also be made subject to further climate change duties, including reporting duties.

58. In addition, as a public authority within the meaning of the Freedom of Information (Scotland) Act 2002, the Commissioner is a “public authority” or “public body” for the purposes of the UK General Data Protection Regulation by virtue of section 7 of the Data Protection Act 2018 (subject to the power under that section to remove that status not being exercised). The UK General Data Protection Regulation (also commonly referred to by the acronym “UK GDPR”) is Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.<sup>3</sup> There are particular rules applied to bodies classified as “public authorities” (over and above those applied to all data processors) in the UK GDPR and the Data Protection Act 2018. An analysis of those rules is beyond the scope of these Notes.

59. Paragraph 3 of schedule 2 adds the Commissioner to the list of bodies in schedule 5 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”). This means that it is a body in relation to which an order can be made under section 14 of that Act where it would improve the exercise of public functions, having regard to efficiency, effectiveness and economy. An order under section 14 of the 2010 Act can (subject to restrictions, and only after the Scottish Parliament has approved a draft of the order):

- modify, confer, abolish, transfer or provide for the delegation of any function of a public body,
- amend the constitution of a public body.

---

<sup>3</sup> As it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018 and as modified by Schedule 1 of the Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019.

60. Paragraph 4 of schedule 2 makes the Commissioner subject to the duties created by the Public Records (Scotland) Act 2011 to produce, implement and keep under review a records management plan.

61. Paragraph 5 of schedule 2 adds the Commissioner to the list of contracting authorities subject to the duties created by the Procurement Reform (Scotland) Act 2014 regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice in procurement.

### ***Interpretation of Part***

#### **Section 23 – interpretation of Part**

62. Section 23 contains definitions of terms used in this Part of the Bill. Subsection (2) provides a power for the Scottish Ministers to amend certain of those definitions. In particular, this power might be used if the power in section 3, to extend the Commissioner’s functions to proceedings other than criminal proceedings, is used. Regulations under subsection (2) will be subject to the affirmative procedure.<sup>4</sup>

## **PART 2 – TRAUMA-INFORMED PRACTICE**

63. This Part of the Bill makes a number of changes to existing legislation in relation to “trauma-informed practice”. That expression is defined for the Bill as a whole in section 69(1) as a means of operating that—

- recognises that a person may have experienced trauma,
- understands the effects which trauma may have on the person, and
- involves adapting processes and practices, based on that understanding of the effects of trauma, to seek to avoid, or minimise the risk of, exposing the person to any recurrence of past trauma or any further trauma.

### ***Principle of trauma-informed practice***

#### **Section 24 – principle of trauma-informed practice**

64. Section 1 of the Victims and Witnesses (Scotland) Act 2014 (“the 2014 Act”) requires a number of persons and organisations involved in the criminal justice system (as listed in section 1(2)) to have regard to a number of principles, that are set out in section 1(3), when carrying out their functions in so far as those functions relate to a person who is or appears to be a victim or witness in relation to a criminal investigation or criminal proceedings. Section 24(2) of this Bill

---

<sup>4</sup> See section 67(2) and [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk).

amends those principles to add a new principle that victims and witnesses should be treated in a way that accords with trauma-informed practice (as defined in section 69(1) of this Bill).

65. Section 2 of the 2014 Act requires the persons and organisations listed in section 2(2) to set and publish standards of service in relation to the carrying out of certain functions in relation to victims and witnesses and in relation to procedures for making and resolving complaints about the way in which the person carries out those functions.

66. Section 24(3)(a) amends section 2(1) of the 2014 Act so that those standards of service must also cover the carrying out of functions in a way that accords with trauma-informed practice (again as defined in section 69(1)). Section 24(3)(b) adds a new subsection (4A) to section 2 of the 2014 Act requiring revised standards of service to be published within 18 months of section 24 coming into force. Those revised standards of service must include standards of service in relation to trauma-informed practice.

### ***Conduct of proceedings in accordance with trauma-informed practice***

67. Sections 25 and 26 amend existing powers in legislation, under which court procedure can be regulated by the High Court of Justiciary and the Court of Session, so that criminal proceedings and civil proceedings can be conducted in a way that accords with trauma-informed practice.

### **Section 25 – criminal courts: conduct of proceedings**

68. Section 25 amends the main power of the High Court to regulate criminal procedure in that court, in the sheriff courts, in the Sheriff Appeal Court and in the justice of the peace courts by act of adjournal (section 305 of the 1995 Act). The power will now include express reference to making provision for the purpose of ensuring that criminal proceedings are conducted in a way that accords with trauma-informed practice (as defined, in section 307(1) of the 1995 Act, by reference to section 69(1) of this Bill).

### **Section 26 – civil courts: conduct of proceedings**

69. Section 26 amends the power of the Court of Session to regulate procedure in that court by act of sederunt (section 103 of the Courts Reform (Scotland) Act 2014). The power will now include express reference to making provision for the purpose of ensuring that civil proceedings are conducted in a way that accords with trauma-informed practice (as defined, in section 136 of the 2014 Act, by reference to section 69(1) of this Bill). This section also amends section 104 of the 2014 Act – the power to regulate procedure in the sheriff courts and in the Sheriff Appeal Court by act of sederunt – in a similar way.

### ***Duty to have regard to principle of trauma-informed practice***

70. Sections 27, 28 and 29 amend a number of provisions in legislation under which business in the civil and criminal courts is scheduled. The primary consideration when scheduling court business will still be the efficient disposal of business (see section 2(2)(a) of the Judiciary and

Courts (Scotland) Act 2008, sections 27(1) and 56(1) of the Courts Reform (Scotland) Act 2014 and section 61(1) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007). But, as a result of the amendments in these sections, the persons responsible for scheduling court business must have regard to the desirability of doing so in a way that accords with trauma-informed practice.

71. As an example of the practical effect this might have, one possible way in which the judiciary could apply trauma-informed practice when scheduling court business would be to aim to assign fixed trial dates in certain circumstances – such as when a vulnerable complainer needs to attend court to give evidence during the course of the trial, because their evidence has not been pre-recorded. However, this is just an illustration: decisions on specific approaches to trauma-informed scheduling would be a matter for the judiciary.

### **Section 27 – scheduling of business in Scottish courts**

72. The Lord President of the Court of Session, as head of the Scottish judiciary, has the responsibility under section 2 of the Judiciary and Courts (Scotland) Act 2008 to make and maintain arrangements for securing the efficient disposal of business in the Scottish courts. Section 27 amends section 2 of the 2008 Act so that, in carrying out that responsibility, the Lord President must have regard to the desirability of doing so in a way that accords with trauma-informed practice.

### **Section 28 – scheduling of business in sheriff courts and the Sheriff Appeal Court**

73. Under section 27 of the Courts Reform (Scotland) Act 2014, the sheriff principal of each sheriffdom has the responsibility of ensuring the efficient disposal of business in the sheriff courts of the sheriffdom. Section 28(2) amends section 27 of the 2014 Act so that, in carrying out that responsibility, the sheriff principal must have regard to the desirability of doing so in a way that accords with trauma-informed practice.

74. Section 28(3) also amends section 29 of the 2014 Act, under which the Lord President may, in certain circumstances, step in and exercise the functions of a sheriff principal under sections 27 and 28 of that Act. The effect of the amendment is to add a new reason which entitles the Lord President to step in. That new reason is that the Lord President considers that the way the sheriff principal is exercising or has exercised the function is prejudicial to the carrying out by the sheriff principal of the responsibility under section 27(1) of the 2014 Act (as amended by section 28(2) of this Bill) in a way that accords with trauma-informed practice.

75. Section 56 of the 2014 Act makes similar provision for the Sheriff Appeal Court to that made for the sheriff court under section 27 of that Act so that the President of the Sheriff Appeal Court has the responsibility of ensuring the efficient disposal of business in that court. Section 28(4) amends section 56 of the 2014 Act so that, in carrying out that responsibility, the President must have regard to the desirability of doing so in a way that accords with trauma-informed practice.

## **Section 29 – scheduling of business in justice of the peace courts**

76. Under section 61 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, the sheriff principal of each sheriffdom is responsible for securing the efficient disposal of business in justice of the peace courts in that sheriffdom. Section 29 amends section 61 of the 2007 Act so that, in carrying out that responsibility, the sheriff principal must have regard to the desirability of doing so in a way that accords with trauma-informed practice.

## **PART 3 – SPECIAL MEASURES IN CIVIL CASES**

77. This Part of the Bill amends the Vulnerable Witnesses (Scotland) Act 2004 (“the 2004 Act”) so that the special measures that a court might take in relation to a vulnerable witness in civil proceedings are available in all civil proceedings, rather than just certain proceedings. It also amends the 2004 Act: to make the special measure, of prohibiting a party to the proceedings from conducting the case in person, available in a wider range of cases; and to make special measures available where a party to the proceedings, who is likely to attend or give evidence in the proceedings, is also to be treated as a vulnerable witness.

### ***Vulnerable witnesses***

#### **Section 30 – vulnerable witnesses**

78. Section 11B of the 2004 Act will be inserted into that Act by section 4(3) of the Children (Scotland) Act 2020 when that section is brought into force. Section 11B makes provision requiring the court in certain civil proceedings to treat a person who is giving, or is to give, evidence in or for the purposes of those proceedings as a vulnerable witness.

79. Where a person is deemed a vulnerable witness under section 11B, the court can order certain special measures to apply to their participation in the proceedings (such as taking their evidence by live television link) to better enable the witness to give evidence and to protect the witness from certain risks if special measures were not used.

80. The civil proceedings to which section 11B applies are proceedings (other than “relevant proceedings”) in which the court is considering making an order under section 11(1) of the Children (Scotland) Act 1995. An order under section 11(1) of that Act is one relating to parental responsibilities, parental rights, guardianship or the administration of a child’s property. “Relevant proceedings” are proceedings under Part 10 and section 154 of the Children’s Hearings (Scotland) Act 2011. Section 11A of the 2004 Act applies to relevant proceedings and, like section 11B, makes provision to treat certain people as vulnerable witnesses.

81. In proceedings covered by section 11B of the 2004 Act, a person will be deemed to be a vulnerable witness if they are protected by a civil protection order (such as a non-harassment order) from conduct by a party to the proceedings, or where they are the victim or complainer in respect of certain criminal offences committed or alleged to have been committed by a party to the proceedings.



82. Section 30 will amend section 11B so that the proceedings to which that section applies will be all civil proceedings, other than relevant proceedings. As a result, it will no longer matter whether the court is considering making an order under section 11(1) of the Children (Scotland) Act 1995. And in all civil proceedings, other than relevant proceedings, a person who is protected by a civil protection order (such as a non-harassment order) from conduct by a party to the proceedings, or who is the victim or complainer in respect of certain criminal offences committed or alleged to have been committed by a party to the proceedings, will be deemed to be a vulnerable witness.

### **Section 31 – prohibition on personal conduct of case**

83. Section 18 of the 2004 Act lists the special measures for vulnerable witnesses that are available to the court in the case of child witnesses and other vulnerable witnesses under sections 12 and 13 of the 2004 Act. Sections 22B to 22D of the 2004 Act (which will be inserted into that Act by section 4(5) of the Children (Scotland) Act 2020 when it is brought into force) make provision for a new special measure for vulnerable witnesses to be available to the court in certain proceedings. That new special measure is prohibiting one or more of the parties to the proceedings from personally conducting the case. This would mean, for example, that a person being sued for historic child abuse, say, might be prohibited from defending the case in person, and so could not personally cross-examine the person who alleges they were abused. Instead, the person being sued would need to employ a lawyer to do so.

84. This prohibition is available to the court only in the case of relevant proceedings to which section 11A of the 2004 Act applies, or in the case of proceedings to which section 11B applied before it was amended by section 30 of this Bill (being proceedings, other than relevant proceedings, in which the court is considering making an order under section 11(1) of the Children (Scotland) Act 1995).

85. Section 31 amends the 2004 Act so that this special measure will be available in the case of all proceedings. To achieve this, section 31(2) amends section 18(1) of the 2004 Act to add reference to the special measure of prohibiting one or more of the parties to the proceedings from personally conducting the case. As a consequence, section 31(3) amends section 22B of the 2004 Act to ensure it will operate in relation to all civil proceedings and in relation to child witnesses as well as other vulnerable witnesses by repealing section 22B(2), which otherwise limits the application of section 22B to certain proceedings only. A new version of section 22B(1) is inserted in place of the existing version and section 22B(3) is repealed as the matter it deals with is now dealt with in the new subsection (1).

86. Finally, section 31(4) amends section 22D of the 2004 Act to replace the current reference to proceedings other than relevant proceedings in relation to which the court is considering making an order under section 11(1) of the Children (Scotland) Act 1995, with a reference to civil proceedings other than relevant proceedings. The effect of this is that the presumption in favour of applying the special measure of prohibiting a party to the proceedings from personally conducting the case applies in a wider range of proceedings.

## **Section 32 – register of solicitors for section 22B of the Vulnerable Witnesses (Scotland) Act 2004**

87. Under section 7 of the Children (Scotland) Act 2020, the Scottish Ministers are required to establish and maintain a register of solicitors who may be appointed by a court under section 22B(6) of the 2004 Act. That provision comes into play where the court orders that the special measure of prohibiting a party to certain proceedings from conducting the case personally is to be taken. Where that special measure is to be taken, and the court is aware the party does not have a solicitor and is not satisfied that the party intends to appoint one, the court is under a duty to appoint a solicitor to represent that party.

88. Section 22B(7) provides that the solicitor appointed must be on the register established and maintained under section 7 of the 2020 Act.

89. Given the amendments made by sections 30 and 31, to the effect that the vulnerable witnesses special measures will apply and be available in all civil proceedings, and in particular, given that the special measure of prohibiting a party from personally conducting the case will now be available in all civil proceedings and not just those relating to children, section 32 moves the provision on the register of solicitors from the 2020 Act, which is generally about children only, into the 2004 Act. It does this by repealing section 7 and re-enacting it as new section 22E in the 2004 Act. The substantive content of the section is unchanged, apart from new section 22E(2)(b) and (4) which clarify that the register of solicitors may be divided into parts that apply in relation to different categories of civil proceedings.

### ***Vulnerable parties***

## **Section 33 – vulnerable parties**

90. New sections 11B and 11C of the Children (Scotland) Act 1995 will be inserted by section 8 of the Children (Scotland) Act 2020 (when that section is brought into force). The new sections make provision requiring the court to consider the use of special measures to reduce distress in relation to certain vulnerable parties where distress may be caused by attending or participating in hearings in certain court proceedings. Those proceedings are civil proceedings in which the court is considering making an order under section 11(1) of the Children (Scotland) Act 1995.

91. Section 33 of this Bill repeals section 8 of the 2020 Act. It then provides for the provisions of the proposed new sections 11B and 11C of the Children (Scotland) Act 1995 to be inserted as new sections 22F and 22G of the 2004 Act instead. In doing so, it amends those provisions to expand the range of proceedings to which they apply so that they will apply, and special measures for vulnerable parties will be available, in all civil proceedings (other than relevant proceedings) and not just those relating to children.

92. As is the case with section 7 of the 2020 Act, the changes being made by the other sections in this Part of the Bill to the 2004 Act so that it applies in all civil proceedings mean that the

provisions on vulnerable parties are better placed in the 2004 Act as they are no longer limited to proceedings relating to children.

## **PART 4 – CRIMINAL JURIES AND VERDICTS**

93. The sections in this Part of the Bill will have the effect of reducing the default size of criminal juries from 15 jurors to 12, as well as making provision for juries that fall below 12 jurors to continue provided at least 9 jurors remain, and for the number of jurors required to constitute a majority in favour of a guilty verdict. Provision is also made to abolish the not proven verdict.

### ***Solemn proceedings***

#### **Section 34 – jury size and quorum**

94. Currently, the default size of juries in criminal trials (15 jurors) is provided for under the common law. Where, during the trial, a juror dies or is discharged by the court for any reason (such as illness), section 90(1) of the Criminal Procedure (Scotland) Act 1995 governs what happens and provides that the case can proceed before the jury provided at least 12 jurors remain.

95. This section will amend the law in two respects.

96. First, it will reduce the default jury size in a criminal trial from 15 jurors to 12 by substituting, for subsection (2) of section 88 of the 1995 Act, two new subsections (2) and (2A). New subsection (2) will replace the common law with provision for juries to consist of 12 jurors. New subsection (2A) simply re-enacts the part of section 88(2) that currently provides for the names of the jurors chosen to be recorded in the minutes of the proceedings.

97. Secondly, it will substitute a new section for section 90 of the 1995 Act. The new version of section 90 will provide that, where a juror dies or is discharged by the court for any reason, the case can proceed before the jury provided at least 9 jurors remain. In a change from the current position under section 90(1), the ability of the trial to proceed does not depend on an application being made by the prosecution or the accused. Instead, the court can itself determine that the trial can proceed provided, having given the prosecution and the accused an opportunity to make representations, the court is satisfied that it is in the interests of justice.

#### **Section 35 – verdict of guilty or not guilty and majority required for guilty verdict**

98. The common law currently provides for the verdicts available in a criminal trial. Those verdicts are guilty, not guilty and not proven. Both not guilty and not proven result in the accused being acquitted. The common law also provides that, where there are 15 jurors, a simple majority of jurors can return a guilty verdict. Where fewer than 15 jurors remain, section 90(2) of the 1995 Act provides for how many jurors constitute a majority. It provides that at least 8 of the remaining jurors must be in favour of a guilty verdict before the jury can return such a verdict. Otherwise the jury is deemed to have returned a verdict of not guilty.

99. Section 35 will abolish the not proven verdict in solemn criminal trials as well as changing the law on what constitutes a majority of jurors for the purposes of returning a verdict of guilty. As a result of new section 88(2), the default criminal jury size will be 12 jurors. Due to this, the common law rules on simple majority verdicts would not work and provision needs to be made for majority verdicts.

100. New section 99A (being inserted into the 1995 Act before section 100), will make provision for both the verdicts available to the jury and for jury majority decisions.

101. First, it provides that the only verdicts available to a jury are guilty or not guilty. A verdict of not proven will no longer be possible.

102. Secondly, subsections (2) and (4) of new section 99A provide that a jury can return a verdict of guilty only if a majority of them are in favour, and governs what will constitute a majority, depending on the size of the jury. Where a full jury of 12 is involved, or where one juror has died or been discharged, then at least 8 jurors are required to be in favour of a guilty verdict. In any other case (so where the jury consists of 9 or 10 jurors), at least 7 jurors are required to be in favour of a guilty verdict. New section 90(3) provides that if a majority (as defined in subsection (4)) is not in favour of a guilty verdict, then the jury must return a verdict of not guilty.

103. New section 99A, being concerned only with the verdicts available to the jury, and the number of jurors who must, depending on the size of the jury, be in favour of a guilty verdict, has no effect on the ability of a jury to deliver a verdict on a part of a charge (after deleting elements of it).<sup>5</sup>

### ***Summary proceedings***

#### **Section 36 – verdicts of guilty or not guilty**

104. As noted above in relation to trials before a judge and jury, the common law governs the verdicts that are available to a judge sitting in summary proceedings without a jury, those verdicts being the same – guilty, not guilty and not proven.

105. This section will change that and does so by inserting new section 161A into the 1995 Act. That new section provides that the only verdicts available to a judge in summary proceedings are guilty or not guilty. A verdict of not proven will no longer be possible.

---

<sup>5</sup> The law governing the ability of the jury to delete parts of a charge and return a verdict on the remaining part is largely to be found in the common law.

## **PART 5 – SEXUAL OFFENCES COURT**

### **Chapter 1 – Establishment, jurisdiction and Judges of the Sexual Offences Court**

106. This chapter creates the Sexual Offences Court, sets out its powers and competence, and makes provision about the cases it can hear.

#### *Establishment*

#### **Section 37 – Sexual Offences Court**

107. Section 37 creates a new court within the Scottish justice system, to be known as the Sexual Offences Court, and provides for it to consist of the Lord Justice General, the Lord Justice Clerk, and judges to be known as Judges of the Sexual Offences Court.

#### *Jurisdiction and competence*

#### **Section 38 and 39 and schedule 3 – jurisdiction and competence: general, and jurisdiction: sexual offences**

108. Section 38 sets out the general parameters of the Sexual Offences Court’s jurisdiction. It provides for the Court to hear and determine cases as set out in the Bill or elsewhere in legislation. There is currently no other legislation which gives the Court powers to hear cases. Subsection (2) provides for cases in the Court to be heard by the Judges who form the Court, as specified in section 37. The Court may sit with only one of those Judges, or with any combination of them. Subsection (3) ensures that the Court has the powers necessary to hear and determine the cases before it, while subsection (4) provides that those powers are subject to any restrictions set out elsewhere in the statute book.

109. Section 39 sets out which offences the Sexual Offences Court may hear. Subsection (1) provides for the Court to try any sexual offence which is triable on indictment in any place in Scotland. There is a definition of “sexual offence” in subsection (5), which defines a sexual offence as being an offence listed in schedule 3 of the Bill, or an attempt to commit one of those offences. The Scottish Ministers can amend the list of offences by way of regulations.<sup>6</sup> The effect of subsection (1) is that the Sexual Offences Court may not hear summary cases, but there is no geographical restriction, within Scotland, to the cases it may hear on indictment.

110. Subsections (2) and (3) provide further detail about the cases which may be heard by the Sexual Offences Court. Subsection (2) provides that, if an accused person is charged with more than one offence, the Sexual Offences Court may try all of those offences, provided at least one of them is a sexual offence as defined in section 39(5). This is subject to subsection (4), which provides that the Sexual Offences Court does not have jurisdiction to hear cases of treason, or

---

<sup>6</sup> Those regulations will be subject to the affirmative procedure. See section 67(2) and [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](#).

breach of duty by magistrates. The High Court of Justiciary has exclusive jurisdiction to try these offences.

111. Subsection (3) allows the Court to continue to try offences other than sexual offences even if the sexual offence which was originally included on the indictment is removed during the course of the trial, as long as it was still on the indictment at the time the trial diet started. This ensures that offences can be tried together rather than split across different courts and proceedings, and removes the risk of a trial being disrupted, and proceedings having to be transferred to a different court, if a sexual offence is removed.

112. Schedule 3 sets out the common law and statutory offences which are sexual offences for the purposes of section 39. In paragraph 16 of schedule 3, an offence under section 1(1) of the Domestic Abuse (Scotland) Act 2018 (abusive behaviour towards partner or ex-partner) is only classed as a sexual offences for the purposes of section 39 if it is apparent from the indictment that there was a substantial sexual element to the alleged commission of the offence.

### ***Judges of the Sexual Offences Court***

#### **Section 40 – appointment of Judges of the Sexual Offences Court**

113. Section 40 deals with the appointment of Judges of the Sexual Offences Court. Appointment is by the Lord Justice General, and to be appointed as a Judge of the Sexual Offences Court, a person must already be a member of the justiciary, holding the office of Lord Commissioner of Justiciary, temporary judge, sheriff principal, or sheriff.

114. Subsection (2) provides for the Lord Justice General to appoint as many Judges as they consider necessary for the running of the Court. Subsection (3) sets out the requirements for appointment. These are that the person has completed training (approved by the Lord Justice General) around trauma-informed practice, which is defined in section 69 of the Bill, and that the Lord Justice General is satisfied that the person has the necessary skills and experience.

115. Under subsection (4), appointment as a Judge of the Sexual Offences Court is not permanent, and the Lord Justice General must, when appointing a Judge, specify how long the appointment is for. A person appointed as Judge of the Sexual Offences Court will continue to hold their existing judicial position in addition to their role in the Sexual Offences Court, meaning that they can hear cases in other courts during their appointment to the Sexual Offences Court.

116. Subsections (5) and (6) provide for what happens if a Judge of the Sexual Offences Court ceases to hold, or is suspended from, their existing position as a Lord Commissioner of Justiciary, temporary judge, sheriff principal, or sheriff. If a Judge ceases to hold their existing position, they would automatically cease to hold their position as Judge of the Sexual Offences Court as well. Similarly, if suspended from their existing position they would automatically be suspended as a Judge of the Sexual Offences Court in addition.

117. Subsections (7) to (9) allow the Lord Justice General to remove a Judge of the Sexual Offences Court from that position, provided that before doing so the Lord Justice General consults with the President and the Vice President of the Sexual Offences Court. If the Lord Justice General holds the position of President of the Sexual Offences Court at the relevant time, then only consultation with the Vice President is required. If a Judge is removed from the Sexual Offences Court by virtue of these provisions, they continue to hold their existing judicial position unless they are separately also removed from that position.

## **Chapter 2 – Organisation of business**

### ***President and Vice President of the Sexual Offences Court***

#### **Sections 41 and 42 – President and Vice President of the Sexual Offences Court, and incapacity and suspension**

118. Section 41 makes provision about the offices of President and Vice President of the Sexual Offences Court. The Lord Justice General may choose to take on the role of President. If the Lord Justice General does not choose to do so, then he or she must appoint the Lord Justice Clerk or one of the Judges of the Sexual Offences Court to the role. Only Judges of the Sexual Offences Court who hold the office of Lord Commissioner of the Justiciary are eligible for appointment as President. Judges of the Sexual Offences Court who hold the office of temporary judge, sheriff principal, or sheriff, are not eligible.

119. The Lord Justice General must also, under subsection (3), appoint a person to the role of Vice President. This can be either the Lord Justice Clerk, if the Lord Justice Clerk has not been appointed as President, or one of the Judges of the Sexual Offences Court. There is no restriction on which of the Judges of the Sexual Offences Court might be appointed to the role of Vice President. However, the President and the Vice President must not be the same person.

120. Subsection (6) provides that both the President and the Vice President are appointed for a period specified by the Lord Justice General. Either of them may resign from the role by giving notice to the Lord Justice General. If the Lord Justice General resigns from the role of President, this is done by publishing notice to that effect. The Lord Justice General also has the power to remove the President or the Vice President from position at any time, under subsection (7). Subsection (8) provides that if the President or Vice President is suspended from their judicial office, then they will automatically be suspended from the role of President or Vice President. (This follows on from section 40, which provides that they are also suspended as a Judge of the Sexual Offences Court.)

121. Section 42 makes further provision for what happens in the event that the President, or both the President and the Vice President, are suspended from office or unable to perform their duties. Inability to perform their duties might arise as a result of illness, for example.

122. Subsection (2) provides that where the President is suspended or unable to perform the role, the Vice President must carry out their duties, and is to be treated as though they were the President.

Subsection (4) makes provision for situations where both the President and the Vice President are suspended or unable to perform the duties of the President. In this case, the Lord Justice General is given the power to act as President, if the Lord Justice General does not already hold the role. If the Lord Justice General is the President and is suspended or unable to perform the duties, or if the Lord Justice General is not the President but chooses not to perform the duties during a period of suspension or incapacity of the President, then the Lord Justice General must direct for the duties to be performed by either the Lord Justice Clerk (if the Lord Justice Clerk is not the person suspended or unable to perform the duties), or another Judge of the Sexual Offences Court.

### ***Disposal of business***

#### **Section 43 – President’s responsibility for efficient disposal of business**

123. Section 43 places a responsibility on the President of the Sexual Offences Court to ensure that cases in the Court are dealt with efficiently, and sets out ways in which this is to be achieved. The responsibility is subject to section 2(2)(a) and (2A) of the Judiciary and Courts (Scotland) Act 2008, which places a similar responsibility on the Lord President in respect of the Scottish courts generally, including the Sexual Offences Court. This ensures that the Sexual Offences Court remains subject to such directions as the Lord President may give in respect of the courts.

### ***Sittings***

#### **Section 44 – sittings of the Sexual Offences Court**

124. Section 44 sets out when and where the Sexual Offences Court may sit. In subsection (3), a power is given to the President of the Sexual Offences Court to make an order which sets out the number of sittings to take place at each place where the Court sits, and when those sittings are to take place. This power is subject to the requirement, in subsection (4), to consult with the Lord Justice General and the Lord Advocate. It is also subject to section 2(2)(a) and (2A) of the Judiciary and Courts (Scotland) Act 2008, which gives the Lord President overarching responsibility in respect of court business in Scotland. Subsection (7) gives a power to the Lord Advocate to require further sittings of the Sexual Offences Court, in addition to those specified in an order.

### ***Transfer of cases***

#### **Sections 45 and 46 – transfer of cases to the Sexual Offences Court, and from the Sexual Offences Court**

125. Sections 45 and 46 deal with the transfer of cases to or from the Sexual Offences Court. Section 45 inserts a new section 288BZA into the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). This section is for proceedings which have been raised in the High Court of Justiciary or the sheriff court. Subsection (4) allows either the prosecutor, or the prosecutor jointly with the accused person, to make an application for the case to be transferred to the Sexual Offences Court. Section 38 will apply here to ensure that only cases where the Sexual Offences Court has jurisdiction can be transferred under this section.



126. If an application is made under subsection (4), then the High Court or the sheriff court in which the proceedings were raised may make an order transferring proceedings to the Sexual Offences Court. Subsection (5) provides that if there is an accused person in the proceedings who was not party to the application to transfer, then the court must allow that person the opportunity to make representations about whether or not the case should be transferred.

127. Section 288BZA(6) sets out the timescales for an application for transfer to the Sexual Offences Court. The application can be made at any time after the accused person has been served with an indictment to the court, up until the day the court first sets a date for the trial diet. This time limit does not change if that trial diet is later changed to a different date. However, under subsection (6)(b), applications to transfer can continue to be made up until the day before the trial actually commences, if the person making the application can demonstrate a reason for making the application late.

128. Subsection (9) of section 288BZA provides that section 74 of the 1995 Act applies to decisions to either make, or not make, an order transferring proceedings to the Sexual Offences Court, regardless of when that decision was made. The application of section 74 means that a decision to make, or not make, a transfer order can be subject to an appeal to the High Court of Justiciary by a party to the case who is not satisfied with the decision.

129. Subsection (10) of section 288BZA provides for a first diet or preliminary hearing in the court in which the proceedings were raised to be treated as the preliminary hearing of the Sexual Offences Court, for the purpose of section 65 of the 1995 Act. This means that the time limits which apply in cases by virtue of that section will continue to apply to proceedings which are transferred, and the case is treated as continuing rather than starting again in the Sexual Offences Court.

130. Section 46 deals with the transfer of cases out of the Sexual Offences Court, to either the High Court of Justiciary or a sheriff court. The procedure for the transfer of proceedings from the Sexual Offences Court is essentially the same as the procedure for transfer to the Sexual Offences Court.

### ***Rights of audience***

#### **Sections 47, 48, and 49 – rights of audience of solicitors and advocates, and statement of training requirement for prosecutors**

131. Sections 47 and 48 set out the requirements for solicitors and advocates respectively to have the right to appear in the Sexual Offences Court.

132. Section 47 provides that for a solicitor to have a right of audience in the Sexual Offences Court, they must complete a course of training on trauma-informed practice which has been approved by the Lord Justice General. Where the proceedings relate to a charge of murder, rape, or both, subsection (2) provides that only solicitor-advocates who meet the training requirement

are entitled to appear in the Court. The Law Society of Scotland is required, under subsection (4), to keep and publish a record of solicitors who have rights of audience in the Sexual Offences Court. This section does not apply to prosecutors appearing on behalf of the Crown.

133. Section 48 provides that for an advocate to have a right of audience in the Sexual Offences Court, they must complete a course of training on trauma-informed practice which has been approved by the Lord Justice General. The Faculty of Advocates is required, under subsection (3), to keep a record of advocates who have rights of audience in the Sexual Offences Court. This section does not apply to prosecutors appearing on behalf of the Crown.

134. Section 49 places a requirement on the Lord Advocate to publish a statement setting out what, if any, training requirement in respect of trauma-informed practice will apply to prosecutors who will appear in the Sexual Offences Court on behalf of the Crown.

### **Chapter 3 – Administration**

135. This Chapter deals with matters of an administrative nature in the Sexual Offences Court, namely the appointment of a Clerk and Deputy Clerks of the Court, and the handling of court records.

#### ***Clerks***

#### **Sections 50, 51, and 52 – Clerk and Deputy Clerks of the Sexual Offences Court**

136. Section 50 provides for the appointment of the Clerk of the Sexual Offences Court by the Scottish Courts and Tribunals Service (“SCTS”). The person appointed must already hold, or have held, one of the administrative offices listed in subsection (4), and subsection (2) provides that, if they currently hold one of those offices, they will continue to hold it in addition to the role of Clerk of the Sexual Offences Court. Subsection (3) gives SCTS the discretion to determine the duration of the appointment, and the terms and conditions which will apply.

137. Section 51 allows SCTS to appoint Deputy Clerks of the Sexual Offences Court. Subsection (2) provides that the number of Deputy Clerks is for SCTS to determine, which gives SCTS the discretion to appoint as many Deputy Clerks as they consider necessary to carry out court business. SCTS is also given the discretion to determine the duration of appointments, and the applicable terms and conditions. Subsection (4) provides that persons appointed to the role of Deputy Clerk of the Sexual Offences Court can hold the role of clerk in another court – which allows them to hold another role when appointed to the Sexual Offences Court, or take up another role following appointment.

138. Section 52 sets out further detail around the role of the Clerk and Deputy Clerks of the Sexual Offences Court. Subsection (1) provides that before they can be appointed to either position, a person must complete training on trauma-informed practice in sexual offence cases, as approved by the Lord Justice General. Subsections (5) and (6) provide for periods when there is

no one holding the role of Clerk, or the person holding the role is unable to carry out the role – for example if they are ill. SCTS is given the power to arrange for the role of the Clerk to be carried out by a Deputy Clerk, or by any other member of staff of SCTS.

### ***Sexual Offences Court records***

#### **Sections 53 and 54 – records, authentication and electronic form**

139. Section 53 amends the Public Records (Scotland) Act 1937, by inserting a new section which provides for the transmission of the records of the Sexual Offences Court to the Keeper of the Registers of Scotland. The details of transmission are to be detailed in an act of adjournal, which can be made by the High Court of Justiciary to regulate matters in the criminal courts.

140. Section 54 makes provision about the authentication of records of the Sexual Offences Court, and allows for records of the Sexual Offences Court to be made and kept in electronic form.

#### **Chapter 4 – Procedure**

141. This Chapter makes provision for the court procedure which will apply to proceedings in the Sexual Offences Court, by applying the provisions of the 1995 Act, as they apply in the High Court of Justiciary, to such proceedings generally, and making certain bespoke provision.

### ***Procedure***

#### **Section 55 – Sexual Offences Court procedure**

142. Section 55 establishes the overarching procedure which is to be used in respect of proceedings in the Sexual Offences Court. It does this by providing, in subsection (1), that the provisions of the 1995 Act are to apply in proceedings in the Sexual Offences Court, as though the proceedings were taking place in the High Court of Justiciary. The 1995 Act contains detailed provisions about criminal proceedings in the High Court of Justiciary, the sheriff courts, and justice of the peace courts. The provisions relating to the High Court, and to proceedings on indictment generally, will therefore apply in respect of proceedings in the Sexual Offences Court, as though references to the High Court or the court were references to the Sexual Offences Court.

143. The 1995 Act provisions will not apply in the Sexual Offences Court to the extent that they are inconsistent with any provision made in the Bill, or in regulations made by the Scottish Ministers setting out further procedure for the Sexual Offences Court.

144. Subsection (2) gives the Scottish Ministers the power to make regulations setting out further detail about procedure in the Sexual Offences Court. The Scottish Ministers are required

to consult the Lord Justice General before making any such regulations. Regulations under subsection (2) will be subject to the affirmative procedure.<sup>7</sup>

145. Subsection (5) gives the High Court of Justiciary the power to make acts of adjournal for the purposes of setting out further detail around the procedure which will apply in proceedings in the Sexual Offences Court. This is in addition to the existing power to make acts of adjournal which the High Court has under section 305 of the 1995 Act, and allows for acts of adjournal to modify legislation as required.

***Prohibition on personal conduct of defence, etc.***

**Section 56, 57, 58, 59, 60 and 61 – prohibition on personal conduct of defence, vulnerable witnesses, ground rules hearings, pre-recording of evidence, taking evidence by commissioner and giving evidence in the form of a prior statement**

146. Sections 56 to 61 set out procedural rules which will apply in the Sexual Offences Court in addition to the procedure set out in the 1995 Act. Section 55(1) means that, where these provisions conflict with anything in the 1995 Act, these provisions will take precedence.

147. Section 56 provides that an accused person may not conduct their own case at a hearing, or for the purposes of a hearing, if a witness will be giving evidence at that hearing. This means that an accused person will require to instruct a solicitor to conduct their case at such hearings, and for the purposes of such hearings.

148. Subsections (2) to (5) make provision for the appointment by the Sexual Offences Court of a solicitor to represent the accused person at such hearings. The Court is required to appoint a solicitor where the Court becomes aware that the accused person has not instructed one to appear at a hearing where a witness will be giving evidence, or to act for the accused person for the purposes of such a hearing, if the Court does not believe that the accused intends to do so. Subsection (5) ensures that if a solicitor is appointed by the Court to act for an accused person, the accused person is not able to dismiss the solicitor. If the Court determines that the solicitor is not able to act upon the instructions of the accused person, or act in that person's best interests, for example due to a conflict of interest, the Court may replace the solicitor with another solicitor.

149. Section 57 modifies section 271 of the 1995 Act in respect of its application to proceedings in the Sexual Offences Court. Section 271 makes provision for certain witnesses in criminal proceedings to be treated as vulnerable, and sections 271A to 271M provide for special measures which can be used in relation to those vulnerable witnesses in the course of proceedings, to better enable them to give evidence and to protect them from certain risks which might arise from their giving evidence. Section 57 amends section 271(1)(c) of the 1995 Act to the effect that, in the Sexual Offences Court, all complainers against whom a sexual offence is alleged to have been

---

<sup>7</sup> See section 67(2) and [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk).

committed are automatically deemed to be vulnerable witnesses, and so the special measures set out in the 1995 Act can be applied to them in accordance with sections 271A to 271M. A complainer in the Sexual Offences Court against whom an offence which is not a sexual offence is alleged to have been committed (for example, where a person is charged with both a sexual offence and assault on the same indictment, the complainer in respect of the assault) is not automatically deemed to be a vulnerable witness. However, they might fall to be treated as a vulnerable witness by virtue of one of the other conditions set out in section 271 of the 1995 Act.

150. Section 58 provides for the modification of the 1995 Act in respect of its application to proceedings in the Sexual Offences Court. Paragraph (a) of subsection (2) inserts a new section 271AZA into the 1995 Act, which will apply in respect of such proceedings. Section 271AZA provides for a particular type of hearing, to be known as a vulnerable witness ground rules hearing, to take place where a vulnerable witness, as defined in section 271 of the 1995 Act as modified, is to give evidence at any hearing in the Sexual Offences Court. The hearing may, under existing Court Rules, be amalgamated with another hearing, to allow for efficiency. The hearing will allow a Judge of the Sexual Offences Court to determine how evidence is to be given and make any orders necessary to put measures in place to protect the wellbeing of the witness.

151. Paragraph (b) of subsection (2) modifies section 271I of the 1995 Act. This section provides for ground rules hearings (as distinct from vulnerable witness ground rules hearings, provided for in new section 271AZA) to take place when a court makes an order for a vulnerable witness to give evidence by way of a commissioner. The modifications in paragraph (b) remove references to ground rules hearings from section 271I of the 1995 Act in relation to proceedings in the Sexual Offences Court, because a vulnerable witness ground rules hearing will take place by virtue of section 271AZA when a vulnerable witness will be giving evidence, so provision for a further ground rules hearing under section 271I is not required.

152. Section 59 provides that the Sexual Offences Court must ensure that all vulnerable complainers who give evidence to the Court are able to do so in advance of the relevant hearing. A definition of “complainer” is provided in subsection (7)(a), as being the person against whom the offence to which the proceedings relate is alleged to have been committed. Paragraph (b) of subsection (7) sets out that a complainer is a vulnerable complainer if the offence which is alleged to have been committed against them is a sexual offence, or if they otherwise fall to be treated as a vulnerable witness by virtue of section 271(1) of the 1995 Act.

153. Subsection (2) sets out what the Sexual Offences Court must do in order to ensure that a vulnerable complainer’s evidence can be given in advance. The Court must authorise either the vulnerable complainer’s evidence being taken by a commissioner, in accordance with section 60, or the vulnerable complainer’s evidence in chief being taken by a statement in accordance with section 61. In addition to making an order authorising one of these measures, the Sexual Offences Court must not, under paragraph (b), authorise the giving of evidence in such a way, or the use of such a measure, as would mean that there was a question over whether all of the vulnerable complainer’s evidence could in fact be given in advance by way of the measure authorised.

154. Subsections (3) and (4) set out the circumstances in which the Court may decide not to comply with the rule in subsection (1). Subsection (3) provides an exception where the vulnerable complainer giving evidence in advance would give rise to a significant risk of prejudice to the fairness of the hearing or to the interests of justice, and that risk outweighs the risk of prejudice to the vulnerable complainer if that complainer were to give evidence in person. Subsection (4) provides an exception where the vulnerable complainer is aged 12 or over and wishes to give evidence at the hearing, if the Sexual Offences Court considers it would be in the vulnerable complainer's best interests to do so.

155. Subsection (5) applies section 271A of the 1995 Act in relation to a vulnerable complainer giving evidence in the Sexual Offences Court. Section 271A sets out various administrative matters around the giving of evidence by a vulnerable witness generally, such as a requirement to notify the court specifying which measure for giving evidence is considered appropriate, and allowing other parties to object to such measures.

156. Section 60 sets out the detail around what will happen when the Sexual Offences Court makes an order under section 59 for a vulnerable complainer to give evidence by way of a commissioner. The Sexual Offences Court is to set a date for proceedings before the commissioner at the same time as appointing the commissioner, and can direct that those proceedings must take place by way of a live television link between the commissioner and the vulnerable complainer.

157. Subsection (4) provides that the proceedings must be recorded – and subsection (6) provides that such recording constitutes evidence without being sworn to by a witness. Subsection (5) provides that the accused may not be present in the room where the proceedings are taking place, or in the room from which the vulnerable complainer is giving evidence by television link. The Sexual Offences Court may authorise an exception to this prohibition, but only if the accused demonstrates special cause. The accused may, however, watch and hear the proceedings in a manner that the Sexual Offences Court determines.

158. Subsection (7) applies various sections of the 1995 Act to proceedings before a commissioner in the Sexual Offences Court, subject to the modifications in subsection (8). These provisions are of an administrative nature.

159. Section 61 sets out the detail around what will happen when the Sexual Offences Court makes an order under section 59 for a vulnerable complainer to give evidence by prior statement. A definition of “statement” is contained in subsection (7), and includes any representation of fact or opinion, however that is expressed. It also includes statements made in a precognition on oath, but not in a precognition which is not made on oath.

160. Subsection (2) provides that a statement is admissible as the vulnerable complainer's evidence in chief, in whole or in part, without any further input to the Sexual Offences Court being required from the complainer. Subsection (3) makes further provision for the admissibility of the statement, subject to subsection (4), which requires that the statement be contained in a document, and that the vulnerable complainer would have been deemed a competent witness at the time the

statement was made. Subsection (5) provides that the requirements of subsection (4) do not apply when the statement is sufficiently authenticated, and was either contained in a precognition on oath or was made in court proceedings. A definition of “document” is contained in subsection (7), and includes documents in writing, maps, plans, graphs, drawings, photographs, and audio or visual recordings. Subsection (7) also explains that a statement is contained in a document if the person who made the statement made it personally, or if the statement is recorded in the document by a person with direct personal knowledge of the making of the statement.

### ***Sentencing***

#### **Section 62 – sentencing power of the Sexual Offences Court**

161. Section 62 provides that the Sexual Offences Court has the same sentencing power as the High Court of Justiciary in respect of persons it convicts of offences. This includes the power to impose an Order for Lifelong Restriction.

## **PART 6 – SEXUAL OFFENCES CASES: FURTHER REFORMS**

### ***Anonymity for victims***

#### **Section 63 – sexual offences cases: anonymity and restriction on publications**

162. This section will insert a new Chapter (Chapter 2B) into Part 6 of the Criminal Justice (Scotland) Act 2016 to make provision, through a prohibition on the publication of information likely to lead to the identification of victims of certain offences, for the lifelong anonymity of such victims.

163. New Chapter 2B consists of sections 106C to 106H.

#### ***Section 106C – restriction on publications relating to listed offences***

164. New section 106C(1) prohibits the publication of information if it would be likely to lead to the identification of a person who is the victim of certain sexual and related offences. Those offences are set out at subsection (5). The prohibition applies whether the offence was committed, or was suspected to have been committed, before or after this new section comes into force (see subsection (8)). Subsection (2) sets out in more detail the sort of information that will be covered by the prohibition on publication. The list in subsection (2) is non-exhaustive.

165. The prohibition in subsection (1) applies from the point the offence is committed for the lifetime of the victim (as provided for by subsection (3)). There are certain exceptions to the prohibition on publication. Subsection (4) provides that the prohibition doesn’t prevent the victim themselves from publishing the information. But a victim who self-publishes information will not be covered by the exception to the extent that information they publish would be likely to lead to the identification of another person who is a victim of a relevant offence. A victim who is an adult is also able to consent to the publication of the information by another (see section 106F(3)). See also sections 106D and 106E for situations where the court may dispense with restrictions.

166. The Scottish Ministers may, by regulations subject to the affirmative procedure,<sup>8</sup> amend the list of offences in subsection (5).

167. Subsection (8) contains definitions of expressions used in this section and in the other sections in new Chapter 2B including, in particular, the meaning of “publication”, which includes, as well as traditional forms of print and broadcast media, social media and other publicly accessible online forms of communication, such as Twitter.

*Section 106D – power to dispense with restriction: child victims*

168. Whereas an adult victim can consent to the publication of information likely to lead to their identification as a victim of an offence, information about a child victim (being a person under 18 years of age) cannot be published by a third party without committing the offence in section 106F even where the child victim purports to give consent. Instead, the sheriff may, on an application by a person who wishes to publish information relating to a child victim, dispense with the restriction imposed by section 106C. Before making a decision on such an application, the applicant and the child victim must be given an opportunity to make representations to the sheriff. The sheriff can grant the order sought (a) if satisfied that the child victim understands the nature of the order sought, appreciates what the effect of making the order will be, and consents to the publication of the identifying information, and (b) if satisfied that there is no good reason why the order should not be made. But the child victim can withdraw consent to publication by giving the applicant written notice before the information is published.

*Section 106E – power to dispense with restriction: conviction for relevant offence*

169. The restriction imposed by section 106C(1) can also be dispensed with if a person, who is a victim of an offence, is convicted of certain offences (“relevant offences”). The restriction is not, however, dispensed with automatically on conviction of a relevant offence. It is for the convicting court to decide whether to do this, and it may do so if satisfied (a) that there is a connection between the conduct of which the person has been convicted and the allegation that the person was the victim of an offence listed in section 106C(5), and (b) that it is in the interests of justice to dispense with the restriction.

170. The relevant offences which can trigger the restriction under section 106C(1) being dispensed with are perjury, attempting to pervert the course of justice and making false statements and declarations (under section 44 of the Criminal Law (Consolidation) (Scotland) Act 1995).

*Section 106F – offence and defences*

171. By virtue of section 106F(1), it is an offence to publish information in breach of the restriction imposed by section 106C(1). That provision does not apply where the restriction has

---

<sup>8</sup> See [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](#).



been dispensed with on the order of the sheriff under section 106D (in the case of a child victim) or where the court has made an order under section 106E.

172. A number of defences are available to a person accused of the offence. Under subsections (2) and (3), a person who publishes information with the written consent of the person to whom the information relates, does not commit the offence provided the person to whom the information relates is 18 years old or over and their consent was not withdrawn before the information was published. The person charged must however have taken reasonable steps to establish that the person to whom the information published relates was over 18. While a child victim could purport to consent to publication, the person publishing would not be able to rely on that as a defence to a charge under subsection (1).

173. Subsection (4) provides a defence where the person charged has published information that was already in the public domain (including where the person to whom the information relates published the information themselves (as mentioned in section 106C(4)). In addition, where the information was originally published by someone other than the person to whom it relates, the secondary publisher has a defence if they had no reason to believe that the conditions mentioned in subsection (3) were not met in relation to that original publication.

174. Finally, a person who publishes information has a defence if they were not aware, and neither suspected nor had reason to suspect, that the information they published included any information to which the restriction in section 106C(1) applies.

175. Section 106F(6) and (7) make provision for how various elements of the possible defences in subsections (2) to (5) can be established.

*Section 106G – individual culpability where organisation commits offence under section 106F*

176. Under section 106G, where an offence under section 106F is committed by an organisation, such as a company or a partnership, and the commission of the offence involved the consent, connivance or neglect on the part of a “responsible individual”, then that individual also commits the offence. Section 106G(3) and (4) set out who “responsible individuals” are in relation to each type of organisation that might commit the offence.

*Section 106H – Crown application: offence under section 106F*

177. By virtue of section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010, the Criminal Justice (Scotland) Act 2016 applies to the Crown. However, in line with usual practice for Acts of the Scottish Parliament, section 106H has the effect that the Crown cannot be found criminally liable for the offence created by section 106F(1). However, through the mechanism in subsection (2), any unlawful conduct on the part of Crown bodies can be declared unlawful by the Court of Session. Section 106H(3) has the effect that this section does not exempt civil servants etc. from criminal prosecution.

### ***Independent legal representation for complainers***

#### **Section 64 – applications to admit certain evidence relating to sexual offences: rights of complainers**

178. Under section 274 of the 1995 Act, where a person is accused of a sexual offence listed in section 288C of that Act, the court must not admit evidence or allow questioning which shows or tends to show that the complainer:

- is not of good character (whether in relation to sexual matters or otherwise)
- has, at any time, engaged in sexual behaviour not forming part of the subject-matter of the charge
- has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject-matter of the charge), engaged in behaviour, not being sexual behaviour, as might found the inference that the complainer is likely to have consented to those acts or is not a credible or reliable witness or
- has, at any time, been subject to any condition or predisposition as might found such an inference.

179. But section 275(1) of the 1995 Act provides that the court can admit such evidence or questioning if, on the application of the accused or the prosecutor, the court is satisfied that:

- the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating the complainer’s character or any condition or predisposition to which the complainer is or has been subject
- that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence charged, and
- the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

180. For the purposes of section 275(1), “the proper administration of justice” includes appropriate protection of the complainer’s dignity and privacy.

181. Currently, the complainer has no right to oppose or make representations to the court in relation to an application made for the purposes of section 275(1). However, following the judgment of the court in the case of *RR, Petitioner v HMA*,<sup>9</sup> the Crown has been required to ascertain the complainer’s position in relation to any application under section 275 and to present that position to the court. The court held that the Crown was bound by section 1 of the Victims

---

<sup>9</sup> [2021] HCJAC 21 – [2021hcjac21.pdf \(scotcourts.gov.uk\)](https://www.scotcourts.gov.uk/2021hcjac21.pdf).

and Witnesses (Scotland) Act 2014, which requires the Crown, among others, to have regard, in exercising its functions, to the principle that a victim of crime should be able to obtain information about what is happening in the criminal investigation or proceedings and, in so far as it would be appropriate to do so, should be able to participate effectively in that investigation and those proceedings.

182. Section 64 will amend the 1995 Act so that, when an application is made for the purposes of section 275(1), the prosecutor must inform the complainer, give the complainer an explanation of the application and of the evidence or questioning proposed, and make the complainer aware of the rights available to a legal representative of the complainer under new section 275ZA.

183. That new section gives the complainer's legal representative, on giving the prosecutor notice that they are acting for the complainer, a right to be provided with the application made for the purposes of section 275(1), the charges against the accused and, if and to the extent approved by the court, any evidence referred to or relevant to the application. In addition, the complainer's legal representative is given the right to make representations to the court on the application.

184. The disclosure of evidence in the case to the complainer's legal representative is dealt with in new subsections (4C) and (4D) of section 275 (inserted by section 64(2)(b)).

185. Section 64(4) and (5) make connected amendments to the 1995 Act. Subsection (4) amends section 275B so that an application under section 275(1) must, in solemn proceedings in the High Court of Justiciary, be made no later than 21 days before the preliminary hearing, in solemn proceedings in the sheriff court, no later than 21 days before the first diet, and, in summary proceedings, no later than 21 days before the intermediate diet, if one is fixed, failing which 21 days before the trial diet.

186. Subsection (5) amends section 74 of the 1995 Act, which provides for appeals from decisions made at preliminary hearings in the High Court or first diets in the sheriff court, so that the complainer's legal representative can appeal a decision to grant an application made for the purposes of section 275(1).

### ***Rape trials pilot***

#### **Section 65 – pilot of single judge rape trials**

187. Section 65(1) gives the Scottish Ministers power by regulations to provide that certain trials on indictment for rape or attempted rape may, for a period specified in the regulations, be conducted without a jury. As well as specifying the criteria that will apply when determining which cases will be involved in the pilot, subsection (2) also requires the regulations to include provision for the accused to be able to make representations as to whether those criteria are met.

188. Before making any regulations under subsection (1), the Scottish Ministers must consult the Lord Justice General, the Lord Advocate, representatives of the legal profession, the Scottish

Courts and Tribunals Service, victim support organisations, and any other person Ministers consider appropriate.

189. Subsection (4) makes clear that the court has all the powers, authorities and jurisdiction it would have had if it had been sitting with a jury. Subsection (5) provides that, where a trial on indictment is held without a jury, the presiding judge must give written reasons for their verdict.

190. Subsections (6) and (7) provide the High Court of Justiciary with the necessary powers to make any appropriate court rules to ensure that the criminal procedure for these trials will operate effectively in practice.

191. Regulations under this section are subject to the affirmative procedure.<sup>10</sup>

### **Sections 66 – report on section 65 pilot**

192. Section 66 places a number of duties on the Scottish Ministers where they have made regulations under section 65(1). They must carry out, or appoint a person to carry out, a review of the operation of trials conducted as part of the pilot. The review must be conducted as soon as reasonably practicable after the end of the pilot. They must also prepare and publish a report on the findings of that review and lay a copy of that report before the Scottish Parliament.

## **PART 7 – FINAL PROVISIONS**

### **Section 67 – regulations**

193. Section 67 makes provision about the powers of the Scottish Ministers to make regulations under the Bill. Subsection (1) provides for each regulation-making power to include the power to make various types of ancillary provision (namely, incidental, supplementary, consequential, transitional, transitory and saving provision), and to make different provision for different purposes. Subsections (2) to (4) specify the parliamentary procedure that applies to different sets of regulations.

194. However, this section does not apply to the power to make commencement regulations under section 71(2) or to the regulation-making powers being inserted into other Acts by the Bill. They are subject to separate provision.

195. Further information on the regulation-making powers contained in the Bill can be found in the accompanying Delegated Powers Memorandum, published at introduction.

---

<sup>10</sup> See section 67(2) and [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](#).

### **Section 68 – ancillary provision**

196. Section 68 enables the Scottish Ministers, by regulations, to make various types of ancillary provision if they think it appropriate to give full effect to the Bill or any provision made under it. This includes power to modify any other legislation (whether primary or secondary) as well as the Bill itself. It also includes, by virtue of section 67(1)(b), power to make different provision for different purposes.

197. Regulations made under this section which amend the text of primary legislation are subject to the affirmative procedure (by virtue of section 67(4)(a)).<sup>11</sup> Otherwise, they are subject to the negative procedure (by virtue of section 67(4)(b)).<sup>12</sup>

### **Section 69 – interpretation**

198. Section 69 defines certain expressions that are used throughout the Bill, including setting out the meaning of “trauma-informed practice”.

### **Section 70 – modification of enactments**

199. Section 70 introduces schedule 4 of the Bill, which contains modifications of certain enactments. The various modifications are explained below.

200. Paragraph 1 of schedule 4 amends the Legal Aid (Scotland) Act 1986 so that criminal legal aid will be available for proceedings in the Sexual Offences Court, including where a solicitor has been appointed to conduct the case on the accused’s behalf under section 56 of this Bill.

201. Paragraph 2 of the schedule amends the Judiciary and Courts (Scotland) Act 2008 so that the Lord President’s responsibility as head of the Scottish judiciary extends to the Sexual Offences Court. In addition, the definition of “judicial office holder” in section 43 of that Act is amended so that it includes Judges of the Sexual Offences Court and section 62 is amended so that the duty on the SCTS to provide support extends to providing support to the President of the Sexual Offences Court.

202. The Courts Reform (Scotland) Act 2014 is amended by paragraph 3 of the schedule so that proceedings under section 106D of the Criminal Justice (Scotland) Act 2016 (proceedings to dispense with anonymity in relation to child victims) are “civil proceedings” for the purposes of section 44 of the 2014 Act, as a result of which they will be proceedings that it will be competent for a summary sheriff to preside over.

---

<sup>11</sup> See [section 29 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](#).

<sup>12</sup> See [section 28 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](#).

## **Section 71 – commencement**

203. Section 71 sets out when the provisions of the Bill will come into effect as a matter of law. It provides that the sections on regulations, ancillary provision, interpretation and the short title, as well as the commencement section itself, will automatically take effect on the day after the Bill receives Royal Assent. All other sections of the Bill will take effect in accordance with regulations made by the Scottish Ministers. Those regulations will require to be laid before the Scottish Parliament but, by virtue of section 67(5), they will not otherwise be subject to any parliamentary procedure.<sup>13</sup>

204. In addition, this section provides that commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes. This means that the Scottish Ministers may bring different provisions into force on different days, or bring a provision into force for one purpose on one day and for remaining purposes on a later day. In particular, they may bring a provision into force on different days for different courts or descriptions of court. For example, the Scottish Ministers could bring section 64 (applications to admit certain evidence relating to sexual offences: rights of complainers) into force for the High Court earlier than for the sheriff court. Alternatively, they may bring a provision into force on different days for different proceedings or types of proceedings. For example, the Scottish Ministers could bring the Part 5 provisions (Sexual Offences Court) into force for proceedings relating to certain types of offence earlier than for proceedings relating to other types of offence. Or they may bring a provision into force on different days for different descriptions of witness. For example, the Scottish Ministers could bring section 58 (vulnerable witness ground rules hearings in the Sexual Offences Court) into force for complainers earlier than for other vulnerable witnesses.

205. Finally, commencement regulations may make different provision for different areas. So, for example, the Scottish Ministers could bring section 64 into force on different days for different parts of Scotland.

## **Section 72 – short title**

206. Section 72 provides that the short title of the Act that the Bill will become will be the Victims, Witnesses, and Justice Reform (Scotland) Act 2024.

---

<sup>13</sup> See [section 30 of the Interpretation and Legislative Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://www.legislation.gov.uk).



*This document relates to the Victims, Witnesses, and Justice Reform (Scotland) Bill (SP Bill 26)  
as introduced in the Scottish Parliament on 25 April 2023*

# **VICTIMS, WITNESSES, AND JUSTICE REFORM (SCOTLAND) BILL**

## **EXPLANATORY NOTES**

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -  
[www.parliament.scot](http://www.parliament.scot)

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:  
[www.parliament.scot/documents](http://www.parliament.scot/documents)